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The Sovereign Should Be Liable For The Wrongful Injury Of Prisoners

Section 844.6 of the California Government Code provides, with certain exceptions, that public entities are immune from liability for injuries to prisoners. The section also provides for immunity for injuries caused by prisoners. This comment analyzes the remedies available to a prisoner in California who is wrongfully injured while incarcerated. The arguments for and against the rule of entity immunity are discussed. In conclusion, the author suggests that a new provision is needed to assure that prisoners receive compensation for injuries wrongfully sustained in prison.

California has provided *criminal* penalties for inhumane or oppressive treatment to prisoners since 1872.[1] In 1913 it was unlawful to use cruel or unusual punishment in the state prisons or reformatories.[2] "Cruel or unusual punishment" was not defined, but the use of thumbscrews, strait jackets, gags and shower baths was specifically prohibited.[3] In 1933 the Penal Code was amended to prohibit the use of "corporal" punishment and the prohibitions were extended to "any other State, county or city institution."[4]

The Penal Code provides criminal penalties for any unlawful assault and battery on a prisoner,[5] but can the prisoner maintain a civil action to seek compensation for any injuries sustained in the unlawful assault? The common law rule was that at least the jailer would be liable for his personal negligence or misconduct.[6] California courts applied this rule from 1900 until *Muskopf v. Corning Hospital District*[7] was decided in 1961.[8] In 1943 the California Supreme Court extended the rule of personal liability to include the superiors of two city police-

1. CAL. PEN. CODE § 147.
2. CAL. STATS. 1913, c. 583, § 1, p. 1010; CAL. PEN. CODE § 673.
3. *Id.*
4. CAL. STATS. 1933, c. 919, § 1, p. 2396; CAL. PENAL CODE § 673.
5. CAL. PEN. CODE § 2650 provides:
the person of a prisoner sentenced to imprisonment is under the protection of the law and any injury to his person not authorized by law is punishable in the same manner as if he were not convicted or sentenced.
6. Annot., 46 A.L.R. 94 (1927).
7. 55 Cal. 2d 211 (1961).
8. Towle v. Mathews, 130 Cal. 574 (1900); Boyes v. Evans, 14 Cal. App. 2d 472 (1936); Appier v. Hayes, 51 Cal. App. 2d 111 (1942).

men.[9] The police officers had beaten to death a prisoner in the city jail. The court concluded that the heirs of the deceased prisoner had stated a cause of action against the chief of police and the city manager for negligent supervision of the city employees. The court, in holding these defendants liable, reasoned that they were negligent for employing officers with known vicious propensities.[10] Since the defendants were the only ones who could initiate action to remove these civil service employees, the court said they had a duty as well as a power to initiate the action and protect the public from abuses by police officers.[11]

Because the liability of the police chief and city manager was predicated on their own negligence, the court found it unnecessary to apply the principle of *respondeat superior*, and consequently did not discuss the issue of the public entity-employer's liability. Although the public entity was not liable, the decision was very important because liability was extended beyond the tortfeasor to financially responsible defendants, the bonded city officials.

The rule of sovereign immunity has long prevented a plaintiff-prisoner's recovery of damages from the public entity-employer.[12] Prosser states that the rule of sovereign immunity "was first extended to a municipality in 1798 in *Russell v. Men of Devon*, at a time when the idea of the municipal corporate entity was still in a nebulous state."[13] A municipal corporation had proprietary activities similar to a private corporation in addition to its governmental activities. The law had distinguished between the two functions and provided for immunity in tort only for governmental activities.[14] Providing and maintaining jails has been regarded as a governmental function and municipal corporations could assert the rule of sovereign immunity to prevent liability for any injuries to prisoners.[15] However, the jailer was personally liable because the care and handling of prisoners was regarded as a ministerial activity or duty.[16]

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9. Fernelius v. Pierce, 22 Cal. 2d 226 (1943).
10. *Id.*
11. *Id.* at 241:
> Against the bestiality and brutality by police officers of the type depicted in this case the public has no adequate protection unless the superiors are answerable for any lack of vigilance in the discharge of their duty.

The court apparently concluded that prisoners were entitled to the protection afforded by civil liability along with the 'free' public.
12. Annot., 46 A.L.R. 94 (1927); Grove v. County of San Joaquin, 156 Cal. App. 2d 808 (1958); Bryant v. County of Monterey, 125 Cal. App. 2d 470 (1954).
13. PROSSER, LAW OF TORTS 1004 (3d ed. 1964).
14. *Id.* at 1005.
15. Grove v. County of San Joaquin, 156 Cal. App. 2d 808 (1958); White v. Board of Commissioners of Sullivan Co., 129 Ind. 396, 28 N.E. 846, 847 (1891), ". . . for the negligence of officers whose duties require an exercise of such governmental power as the police power, neither a county nor a city is liable."
16. Winborne v. Mitchell, 111 N.C. 13, 15 S.E. 882 (1892); Farmer v. State for Use of Russell, 224 Miss. 96, 79 So. 2d 528 (1955).

This immunity of state and local governments has been criticized "for well over a century,"[17] but it was not until 1957 that a state supreme court abolished the rule of sovereign immunity as it applied to municipal corporations. The Florida Supreme Court in *Hargrove v. Town of Cocoa Beach*[18] held that "to continue to endow this type of organization [incorporated city] with sovereign divinity appears to us to predicate the law of the 20th century upon an 18th century anachronism."[19] Significantly, the plaintiffs in the *Hargrove* case happened to be the heirs of a prisoner who died as a result of a fire in the city jail when the jail was left unattended.

The California Supreme Court, in 1961, followed the example of the Florida Supreme Court. In *Muskopf v. Corning Hospital District*[20] the court said that "the rule of government immunity from tort liability . . . must be discarded as mistaken and unjust."[21] Although the *Muskopf* case involved a negligent act, the scope of the decision was broad enough to impose liability on a public entity for the intentional torts of its employees.[22] However, the legislature, in response to *Muskopf*, passed a moratorium measure to prevent the decision from having a controlling effect on future California cases.[23]

The California Legislature, in 1957, had authorized the California Law Revision Commission to conduct a study on sovereign immunity.[24] The California Tort Claims Act of 1963 was largely the product of the Commission's study and recommendations.[25] The legislation was intended to abolish the common law rule of sovereign immunity and to regulate the entire field of government tort liability.[26] Section 815.2 of the California Government Code provides for public entity liability for injuries caused by the entity's employee acting within the scope of his employment.[27]

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17. PROSSER, *supra* note 13, at 1010.
18. 96 So. 2d 130, 60 A.L.R.2d 1193 (1957).
19. 96 So. 2d at 133.
20. 55 Cal. 2d 211 (1961).
21. 55 Cal. 2d at 213. The decision applied to state and local governments.
22. Chromiak v. City of Los Angeles, 219 Cal. App. 2d 860 (1963); Jones v. City of Los Angeles, 215 Cal. App. 2d 155 (1963).
23. CAL. STATS. 1961, c. 1404, § 1, p. 3209. Section 1 of the Act provided ". . . the doctrine of governmental immunity from tort liability is hereby re-enacted as a rule of decision in the courts of this State. . . ." Section 3 provided that Section 1 "shall remain in effect until the 91st day after the final adjournment of the 1963 Regular Session of the legislature, and shall have no force or effect on or after that date."
24. CAL. STATS. 1957, Resolutions, c. 202, p. 4590.
25. *See* A. VAN ALSTYNE, CALIFORNIA GOVERNMENTAL TORT LIABILITY (Continuing Education of the Bar, Practice Book No. 24, 1964, Supp. 1969). The Act was not given a "short title" by the legislature; it was enacted in several separate legislative acts.
26. CAL. GOV'T CODE § 815 and Legislative Committee Comment. *See also* 1963 CAL. L. REVISION COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES, Vol. 4, at 811 [hereinafter cited as COMMISSION].
27. CAL. GOV'T CODE § 815.2. This section basically provides that the principle

The rights of prisoners are covered under Chapter 3, Police and Correctional Activities, Part 2, Division 3.6, of the Government Code (commencing with section 844). Although section 815.2 provides for entity liability as a general rule, section 844.6 provides an exception for tort actions brought by prisoners.[28] Section 844.6 retains the common law principle of government immunity for injuries to prisoners except those injuries caused by the operation of a motor vehicle by a public employee and medical malpractice by a public employee.[29] The section also retains the rule of personal liability for the employee.[30] Thus, except for motor vehicle injuries and medical malpractice, section 844.6 limits a prisoner's action for damages to that available under the pre-*Muskopf* case law.

Two subsequent sections, 845.4 and 845.6, provide for entity liability for specific tortious acts of the entity's employees.[31] A public employee and his entity-employer are liable for any injury[32] to a prisoner proximately caused by an "intentional and unjustifiable" interference with the prisoner's right to a judicial determination of the legality of his confinement.[33] In addition, a public entity is liable where a public employee, acting in the scope of his employment, knew or had reason to know that the prisoner was in need of *immediate* medical care and the employee failed to take reasonable action to summon such medical care.[34]

Section 844.6, as originally enacted, provided for entity immunity,

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of *respondeat superior* is to apply to public employers. Subdivision (a) provides:

> A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

Subdivision (b) provides for entity immunity when the employee is immune "except as otherwise provided by statute." For a complete discussion of the California Tort Claims Act see VAN ALSTYNE, *supra* note 25.

28. CAL. GOV'T CODE § 844.6 as originally enacted (CAL. STATS. 1963, c. 1681, p. 3277):

> (a) Notwithstanding any other provisions of law except as provided in subdivisions (b), (c), and (d) of this section, a public entity is not liable for:
> (1) An injury proximately caused by any prisoner.
> (2) An injury to any prisoner.
> (b) Nothing in this section affects the liability of a public entity under Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code.
> (d) Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission . . . the public entity shall pay . . . any judgment based on a claim against a public employee licensed in one of the healing arts . . . .

29. *Id.*

30. *Id.*

31. CAL. GOV'T CODE §§ 845.4, 845.6.

32. "Injury" is defined in CAL. GOV'T CODE § 810.8 to mean "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings, or estate . . . ."

33. CAL. GOV'T CODE § 845.4.

34. CAL. GOV'T CODE § 845.6.

"Notwithstanding any other provisions of law, except as provided in subdivisions (b), (c), and (d) of this section . . . ."[35] However, section 845.6 (liability for failure to summon medical care) was enacted at the same time.[36] Did the legislature intend the immunity provided in section 844.6 to prevail over "all" other provisions of law including section 845.6? In *Sanders v. County of Yuba*[37] the court relied on the legislative history in reconciling the two provisions.[38] The court pointed out that section 845.6 had been significantly amended on April 3, 1963, after section 844.6 had been introduced for the first time.[39] On the same day section 844.6 was deleted, however, it was reinstated on April 22, 1963.[40] Although section 844.6 was the latest expression of the legislature, the court concluded that the legislature did not intend to impliedly repeal section 845.6 by this subsequent reinstatement of section 844.6.[41] Both sections were enacted at the same time; the court relied on the rule that

> [a] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter . . . would be broad enough to include the subject to which the more particular provision relates.[42]

Therefore, the court resolved the conflict presented by the language in section 844.6 which the legislature neglected to amend when the section was reintroduced on April 22, 1963.

The court in *Hart v. County of Orange*[43] pointed out that "section 845.6 deals with the creation of a liability, not with the reiteration of an immunity and therefore deals with a subject not inherent in section 844.6 . . . ."[44]

1970 Amendments to the Government Code Provisions Pertaining to Prisoners

The California Law Revision Commission recognized the conflict caused by the language of section 844.6 and recommended a revision in 1969.[45] Consequently, in 1970 the state legislature amended subdivi-

35. CAL. STATS. 1963, c. 1681, § 1, p. 3277.
36. *Id.* at 3278.
37. 247 Cal. App. 2d 748 (1967).
38. *Id.* at 752.
39. *Id.* at 753.
40. *Id.* at 752.
41. *Id.* at 753.
42. *Id.* at 753-754.
43. 254 Cal. App. 2d 302 (1967).
44. *Id.* at 306. *See also,* Comment, *California Public Entity Immunity From Tort Claims by Prisoners,* 19 HAST. L.J. 573 (1968), for a complete discussion of these cases.
45. 1969 COMMISSION, Vol. 9, at 826.

sion (a) of section 844.6 to read "Notwithstanding any other provision *of this part*, except as provided in this section *and in Sections 814, 814.2, 845.4 and 845.6* . . . ."[46] This amendment codified the *Sanders* and *Hart* decisions by expressly making the entity's liability for failure to summon medical help (section 845.6) an exception to the general rule of entity immunity.

Section 814 also became an express exception to section 844.6 by the 1970 amendment.[47] This section provides a prisoner with the right to obtain injunctive relief against a public entity or employee.[48] In making section 814 an express exception to section 844.6, the legislature has made it clear that the entity's immunity does not extend to injunctions obtained by prisoners.

Giving a prisoner this right to enjoin a public entity may have unexpected beneficial effects. If a prisoner can obtain a decree ordering a public entity to restrain its employees from abusive treatment of prisoners, the entity will be compelled to exercise better control over prison guards. However, even if a prisoner can enjoin the entity, section 844.6 still prevents him from obtaining compensation from the entity for injuries already sustained.

Section 814.2 of the Government Code provides that a person's rights under the Workmen's Compensation Act[49] are not affected by the Tort Claims Act. Although the 1970 amendment made section 814.2 an exception to section 844.6, a prisoner's rights under workmen's compensation, at present, are very limited.[50]

The change in the language from "provisions of the law" to "provisions of this part" in subdivision (a) of section 844.6 will prevent the section from impliedly repealing statutes enacted in other codes.[51]

The legislature, at the same time, also amended subdivision (c) of section 844.6.[52] Previously, subdivision (c) provided that "nothing in this section prevents a person other than a prisoner, from recovering

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46. CAL. STATS. 1970, c. 1099, § 5, p. 1957. Subsection (a) now reads:
Notwithstanding any other provision of this part, except as provided in this section and in Sections 814, 814.2, 845.4, and 845.6, a public entity is not liable for:
(1) An injury proximately caused by any prisoner.
(2) An injury to any prisoner.

47. CAL. GOV'T CODE § 814. *See* Legislative Committee Comment which clearly establishes that the right to injunctive relief is not impaired by the subsequent sections of the Tort Claims Act.

48. *Id.*

49. CAL. LABOR CODE §§ 3201-6149.

50. CAL. PEN. CODE § 2700; CAL. LABOR CODE § 3365.

51. *See* Legislative Committee Comment—Assembly 1970 Amendment, CAL. GOV'T CODE § 844.6, "of law", taken literally, could impliedly repeal CAL. PEN. CODE §§ 4900-4906.

52. CAL. STATS. 1970, c. 1099, § 5, p. 1957.

from the public entity for an injury resulting from the dangerous condition of public property under Chapter 2 (commencing with section 830) of this part."[53] In *Garcia v. State of California*[54] the Fifth District Court of Appeal held that the heirs of a deceased prisoner could recover in a wrongful death action as a "person other than a prisoner."[55] The Law Revision Commission in its 1969 recommendation argued that no persuasive reason had been advanced for allowing the heirs to recover when a prisoner himself could not recover if the injuries were non-fatal.[56] Accordingly, subdivision (c) was amended to read "[e]xcept for an injury to a prisoner . . ." the entity would be liable for injury caused by a dangerous condition of its property.[57]

Subdivision (d) of section 844.6 was also amended. Subdivision (d) now states that a public entity is liable for a judgment on any claim against an employee "who is lawfully engaged in the practice of one of the healing arts under *any law of this state.*"[58] Previously, the section provided that the judgment be against a public employee "licensed" in one of the healing arts under the California Business and Professions Code.[59] "Licensed" could have been interpreted to exclude persons "certificated" or "registered" under the Business and Professions Code.[60] It also could have been interpreted to exclude persons unlawfully practicing in California without a California license.[61]

Section 845.4 of the Government Code was also amended by the legislature during the 1970 session. Previously under section 845.4 a prisoner had to await a judicial determination that his confinement was illegal before he could bring an action for an employee's "intentional and unjustifiable" interference with his right to such judicial determination.[62] However, the statute of limitations on his claim for injury may have expired before the determination could be made that his confinement was illegal.[63] The section, as amended, now provides that no cause of action shall accrue for the injury until the confinement is deemed illegal.[64]

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53. CAL. STATS. 1963, c. 1681, p. 3277.
54. 247 Cal. App. 2d 814 (1967).
55. *Id.*
56. 1969 COMMISSION, Vol. 9, at 825. The court in *Garcia* concluded that the legislature intended to include heirs of the prisoner within the meaning of "person other than a prisoner" since the heirs' cause of action for wrongful death under section 377 of the Code of Civil Procedure is original and distinct and not derivative.
57. CAL. STATS. 1970, c. 1099, § 5, p. 1957.
58. *Id.* at 1958.
59. CAL. STATS. 1963, c. 1681, p. 3277.
60. *See* Legislative Committee Comment CAL. GOV'T CODE § 844.6.
61. *Id.*
62. CAL. STATS. 1963, c. 1681, p. 3278.
63. CAL. GOV'T CODE § 845.4 and Law Revision Commission Comment.
64. CAL. STATS. 1970, c. 1099, § 6, p. 1958.

The second sentence of section 845.6 of the Government Code was also amended to conform with section 844.6(d).[65] The liability of the entity for the failure of its employees to summon medical help does not exonerate an employee *lawfully engaged in one of the healing arts* from personal liability for malpractice.[66]

Suspension of Civil Rights

A prisoner incarcerated in one of California's state prisons may not be able to exercise his rights under the Government Code provisions because of the civil disability statutes.[67] California's civil disability statutes are construed strictly and are applied *only* to persons convicted in courts of the state and incarcerated in *state* prisons.[68]

Prisoners in state prisons have to wait until they are discharged or released on parole in order to bring an action for damages under the provisions of the Government Code.[69] The California Adult Authority may restore a prisoner's right to bring an action, [70] but it can be argued that the immediate exercise of a prisoner's legal rights should not be left to the discretion of any state agency. In order to fully guarantee a state prisoner's rights under the Government Code, the Penal Code should be amended.[71] An appropriate amendment would allow inmates of the state prisons the right to bring an action for damages while incarcerated, corresponding to the right of action allowed city and county prisoners. Even though the statute of limitations may be tolled until the prisoner is "out", the lapse of time may hinder his ability to produce evidence at the trial.[72] Therefore, it cannot be argued that the temporary suspension of a prisoner's right to sue is a moot issue.

A Prisoner's Right of Action Under the Federal Civil Rights Statutes

A further argument for allowing a state prisoner the right to bring

65. *Id.*
66. *Id.*
67. CAL. PEN. CODE § 2600.
> A sentence of imprisonment in a state prison for any term suspends all the civil rights of the person so sentenced. . . . But the Adult Authority may restore to said person during his imprisonment such civil rights as the authority may deem proper. . . .

There are some exceptions provided to the general suspension, but the right to act as a *plaintiff* in a civil suit is not one of them. *See* 18 C.J.S. *Convicts* § 7 (1939, Supp. 1970).
68. Hayashi v. Lorenz, 42 Cal. 2d 848 (1954).
69. *See* Comment, *Convicts-Loss of Civil Rights-Civil Death in California,* 26 So. CAL. L. REV. 425, 429 (1953), citing available case law for the view that acting as plaintiff in a civil suit is one of the civil rights suspended for inmates of state prisons.
70. CAL. PEN. CODE § 2600.
71. CAL. PEN. CODE § 2600 could be amended to add the provisions of Chapter 3, Part 1, Division 3.6, of the Government Code as another exception to the suspension of civil rights.
72. C. Foote, *Tort Remedies For Police Violations of Individual Rights,* 39 MINN. L. REV. 493 (1955).

an immediate action in the state courts is that he can bring an action in the federal courts regardless of the California Penal Code.[73] In *McCollum v. Mayfield*[74] the federal district court rejected defendant's assertion that section 2600 of the California Penal Code deprived plaintiff of the capacity to sue and held in reference to rights of prisoners under 42 U.S.C. 1983 that the "plaintiff is a person within the jurisdiction of the United States in spite of the fact that he is an imprisoned felon, and consequently is empowered to sue in the federal courts under this section."[75] The federal courts generally hold that insufficient or negligent medical care is not a violation of a prisoner's federal civil rights.[76] However, in the *McCollum* case the court concluded that:

> A refusal to furnish medical care when it is clearly necessary, such as is alleged here, could well result in the deprivation of life itself; it is alleged that plaintiff suffered paralysis and disability from which he will never recover. This amounts to the infliction of permanent injuries, which is, to some extent, a deprivation of life, of liberty, and of property. Since these rights are protected by the Fourteenth Amendment to the Federal Constitution, the complaint sufficiently alleges the deprivation of a right, privilege or immunity secured by the Constitution and laws of the United States.[77]

The *McCollum* case illustrates the distinction between negligent medical care and no medical care; the latter, in some cases, can be a violation of a prisoner's civil rights.[78]

The United States Court of Appeal for the Ninth Circuit in *Brown v. Brown*[79] held that an allegation by a prisoner that he was beaten by prison officials stated a cause of action under the Civil Rights Act. The court admitted that such allegations "tax a reader's credulity . . . but for passing on a motion to dismiss for failure to state a claim, the facts set forth in the complaint must be assumed to be true."[80]

Even if the federal civil rights statutes give a prisoner an immediate

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73. McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Calif. 1955).
74. *Id.*
75. *Id.* at 116.
76. Com. of Pa. *ex rel.* Gatewood v. Hendrick, 368 F.2d 179 (3d Cir. 1966), *cert. den.* 386 U.S. 925 (1967); U.S. *ex rel.* Lawrence v. Ragen, 323 F.2d 410 (7th Cir. 1963); Mayfield v. Craven, 299 F. Supp. 1111 (E.D. Calif. 1969).
77. 130 F. Supp. at 115.
78. The elements required to state a cause of action for lack of medical care under the civil rights appear to be:
(1) an acute physical condition which
(2) requires immediate care and
(3) the total lack of medical care results in permanent injuries.
See note in Stiltner v. Rhay, 371 F.2d 420 (1967). *See also* Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957); U.S. *ex rel.* Knight v. Ragen, 337 F.2d 425 (7th Cir. 1964), *cert. den.*, 380 U.S. 985 (1964).
79. 368 F.2d 992 (1966).
80. *Id.* at 993.

cause of action for intentionally inflicted injuries in a state prison, they do not affect his right to recover damages from the state.[81] The United States Supreme Court in *Monroe v. Pape*[82] held that municipalities were never intended by Congress to be a "person" within the meaning of the Civil Rights Act.[83] Therefore, a prisoner cannot hold a public entity liable for damages caused by the public employee's unlawful actions.

The Arguments For Retaining Section 844.6 of the California Government Code

Subdivision (d) of section 844.6 states that a public entity "may but is not required" to pay judgments against its employees where they are personally liable.[84] The Law Revision Commission study supports this provision because "some public entities have followed the policy of paying any judgment against an employee who acted in good faith in the scope of his employment even though the entity would be immune from direct liability under section 844.6."[85] In recommending retention of section 844.6, the Commission study contends that the section does not result in injustice in actual operation, "but has provided employees engaged in law enforcement activities with an incentive to exercise reasonable care towards prisoners."[86]

The Commission study does not explain how the section provides such an incentive for employees, but this conclusion appears to be based on the fact that "some" entities have followed the policy of paying any judgments against an employee who acted in good faith.[87] If the Commission's conclusion is correct then it should logically follow that requiring *all* entities to pay any judgment against their employees will provide even more incentive to exercise reasonable care toward prisoners.

Unless all public entities follow the policy of paying their employees' judgments, some prisoners will be compensated for their "just" claims while others might not if the employee cannot pay the judgment himself. Since each entity is the judge of which claims it will pay, the standards of good faith will vary with the different public entities. The satisfaction of the prisoner's judgment may therefore depend entirely

81. Monroe v. Pape, 365 U.S. 167 (1961).
82. *Id.*
83. *Id.*
84. CAL. GOV'T CODE § 844.6.
85. 1969 COMMISSION, Vol. 9, at 825.
86. *Id.*
87. *Id.*

upon which public entity incarcerates him, not upon the righteousness of his claim.

In addition to the Law Revision Commission's reason for urging retention of section 844.6 it can be argued that public expenditures will increase and there will be a breakdown in prison discipline without the immunity for public entities.[88] There is evidence that the argument that entity liability will significantly increase the cost of government lacks credibility.[89] In 1959 the awards made in the New York state prison system amounted to slightly over one percent of the total awards against the state from all tort claims.[90] Justifying the existence of an immunity for public entities for injuries to prisoners because of a financial burden seems to be a tacit admission that many prisoners are injured by public employees acting within the scope of their employment.[91]

Another argument advanced in support of retaining the principle of section 844.6 is the threat to discipline if a prisoner could bring an action against the entity. The example of the federal government and some state governments which provide for entity liability[92] can serve as evidence to challenge the validity of this argument. The United States Supreme Court, in 1963, held that a federal prisoner could recover damages against the government for the neglience of an employee under the Federal Tort Claims Act.[93] The burden of showing that discipline has disintegrated in the federal prison system since the Court's decision would be difficult to sustain. If a prisoner's right to sue for money damages causes a "discipline breakdown", the breakdown should occur regardless of whom the prisoner sues, the public entity or employee. Since section 844.6 specifically authorizes a prisoner suit against the employee, the "discipline breakdown" argument will not support the entity's immunity; it is difficult to imagine how discipline could be a problem when a prisoner can sue the entity but not be a problem when he can sue only the employee.

If any of the arguments for entity immunity are valid, it could be argued that the entity should be immune from liability for all injuries to

88. *See* Comment, 19 HAST. L.J., *supra* note 44, at 581.
89. *Id.*
90. 1963 SUPP. TO THE APPENDIX OF THE JOURNAL OF THE SENATE, *Government Tort Liability*, 26, table 35.
91. Assaults by guards upon prisoners still occur in California. *See* J. Ritter, *Nightmare for the Innocent in a California Jail*, LIFE, August 15, 1969. *See also*, THE SACRAMENTO BEE, *LA Sheriff Fires 3 Deputies in Mistreatment of Prisoners*, February 5, 1971, p. B8, col. 1.
92. United States v. Muniz, 374 U.S. 150, n.16 (1963). New York, Illinois, North Carolina, and Washington. Louisiana also allows recovery from the state under the principle of respondeat superior, *see* Lewis v. State, 176 So. 2d 718 (1965).
93. U.S. v. Muniz, 374 U.S. 150 (1963).

prisoners. Yet, subdivisions (b) and (d) of section 844.6 and sections 845.4 and 845.6 provide for entity liability for certain injuries to prisoners.[94] These exceptions to the general rule of immunity could result in unequal compensation of prisoners' injuries. For example, a prisoner whose hand was injured in a motor vehicle accident where a prison employee was driving could secure a judgment against the entity.[95] But a prisoner whose hand was injured when a guard slammed a cell door on it could only secure a judgment against the guard, who may be unable to pay the judgment.[96]

Arguments For Repealing Section 844.6

The major argument for repealing section 844.6, in addition to the weakness of the arguments for retention, is that ultimate responsibility (liability in tort) for the acts of their employees will compel public entities to hire more qualified police officers and jail guards and to more closely supervise them.[97] Professor Foote, in discussing the problems of tort remedies as a deterrent to police illegality, feels there are three essential steps to making tort remedies effective deterrents. One step is governmental liability.

> Governmental liability is important not only to provide financially responsible defendants, but primarily so that the deterrent will be effective where it is needed—at the level where police policy is made. If cities are responsible for torts committed by officers who are known to be vicious and ill-tempered or dangerously insane or chronically alcoholic, the liability is likely to discourage the retention of such officers and compel a better police force.[98]

Liability for negligently caused injuries to prisoners should compel public entities to institute safety programs. Therefore, it can be argued that the quality of care should improve with entity liability and the number of injuries should decrease.[99]

Another argument for repeal of section 844.6 is that the morale of public employees may improve with entity liability. The Law Revision Commission study apparently recognized this argument when it concluded that section 844.6 should be retained because some entities pay judgments against their employee's who acted in good faith.[100] But

94. Injuries caused by motor vehicle accidents, medical malpractice, failure to summon medical care and interference with prisoners' access to courts.
95. CAL. GOV'T CODE § 844.6(b).
96. CAL. GOV'T CODE § 844.6(a).
97. *Foote, supra* note 72, at 514.
98. *Id.*
99. See the study on sovereign immunity prepared for the Law Revision Commission by Professor Van Alstyne in 1963 COMMISSION, Vol. 5, at 418.
100. *See* text at note 86.

the logical extension of the Commission's argument will demonstrate that the argument is actually one for the repeal of section 844.6. If the fact that some entities pay judgments against their employees is an incentive for their employees to "exercise reasonable care towards prisoners,"[101] then the repeal of section 844.6 will force all entities to pay such judgments.[102]

It is possible to argue that the personal liability of the employees is the best incentive to "exercise reasonable care toward prisoners." However, the repeal of section 844.6 will not absolve the employee of personal liability.[103] Where an employee acts in good faith, his public entity-employer will pay the judgment and the employee will not have to fear financial loss from "doing his job".[104] The employee who acts in bad faith may be forced to indemnify the public entity[105] and therefore will not be encouraged to abuse prisoners because the entity would be liable in the absence of section 844.6.

Effect of Repeal of Section 844.6

A. Liability for Acts of Public employees.

The repeal of section 844.6 will allow a prisoner to recover damages from a public entity when he could have recovered from its employee.[106] The employee's immunity will usually extend to the entity, but occasionally the entity may be liable where its employee is immune.[107] The repeal of section 844.6 may expose a public entity to liability for an injury to a prisoner caused by a dangerous condition of public property—the jail.[108] However, section 845.2 of the Government Code provides that a public entity is not liable for failure to provide a jail or, if one is provided, for failure to provide sufficient equipment, personnel, or facilities. The legislature did not intend section 845.2 to absolve an entity of liability for dangerous conditions of public property under sections 830-835.4 of the Government Code.[109] Therefore, the most reasonable interpretation of section 845.2 seems to be that a public entity is liable for a dangerous condition of its jail, but insufficient equipment, personnel or facilities by themselves should not be considered a dangerous condition.

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101. *Id.*
102. *Id.*
103. CAL. GOV'T CODE § 820.
104. CAL. GOV'T CODE § 825.
105. CAL. GOV'T CODE § 825.6.
106. CAL. GOV'T CODE § 815.2(a).
107. CAL. GOV'T CODE § 815.2(b).
108. CAL. GOV'T CODE §§ 830-835.4.
109. CAL. GOV'T CODE § 845.2 and Legislative Committee Comment.

If a public entity is liable for the acts of its police officers and jail guards, should there be a distinction made between negligent and intentional acts for purposes of entity liability? California has held municipal corporations liable for the intentional torts of their employees when they acted in the scope of their employment and were engaged in proprietary activities.[110] The California Tort Claims Act makes no general distinction for purposes of entity liability between negligent and intentional acts of the public employee as the Federal Tort Claims Act does.[111] Thus, the repeal of section 844.6 would result in a public entity's liability for the intentional as well as negligent acts of its jail guards. If one of the purposes in imposing liability on the entity is to protect prisoners from sadistic jailers, there should be no distinction between negligently and intentionally caused injuries. Making such a distinction would defeat the very purpose of imposing liability on the public entity. Of course extension of entity liability includes only compensatory damages and not punitive damages, which could still be recoverable from the tortfeasor.[112]

Even though there may be entity liability for the intentional torts of its employees, not all intentional acts will result in liability. A public employee is immune from liability for his discretionary acts.[113] The amount of force used to enforce prison discipline and prevent riots and escapes can be labeled "discretionary" and liability would thus be avoided.[114] However, the California Supreme Court has defined a discretionary act as one involving basic policy decisions.[115] Ministerial acts for which liability exists are those where there is a duty to act.[116] The determination of what punishment to impose for violations of prison regulations may involve policy decisions by prison administrators. However, enforcement of prison regulations by the guards is a duty imposed on them by the nature of their job and therefore the act of "enforcing" is ministerial, not discretionary.

Although a public entity may not be able to defend a suit by a prisoner on the grounds that an intentional battery by a guard was a discretionary act, it can assert the employee's defense of a privilege to use physical force. The California Supreme Court has stated that a guard

110. Ruppe v. City of Los Angeles, 186 Cal. 400 (1921).
111. 28 U.S.C. 2680(h). However, CAL. GOV'T CODE § 818.8 provides that a public entity is not liable for *intentional* or negligent misrepresentations of a public employee.
112. CAL. GOV'T CODE § 818.
113. CAL. GOV'T CODE § 820.2. Section 815.2(b) provides for entity immunity when the employee is immune.
114. *Id.*
115. Lipman v. Brisbane School District, 55 Cal. 2d 224, 230 (1961); Johnson v. State of California, 69 Cal. 2d 782 (1968).
116. *Id. See also* PROSSER, *supra* note 13, at 1015.

"may use reasonable force upon a prisoner to enforce proper prison regulations."[117] What constitutes reasonable force will vary with the factual circumstances of each case. The use of deadly force to prevent the escape of a felon from a state prison may not be unreasonable. The California Supreme Court has recognized the problem of maintaining prison discipline and has imposed the burden of proof upon the plaintiff-prisoner.[118]

Since the plaintiff must bear the burden of proving an intentional battery by a guard and there is a possible defense of privilege, there should be no distinction between an employee's intentional and negligent torts for purposes of entity liability. The fact that "courts are and should be reluctant to interfere with or hamper the discipline . . . in a prison"[119] suggests that all doubts as to the issue of abuse of privilege will be resolved in favor of the entity.

B. Liability for Injuries Caused by Other Prisoners.

Subdivision (a) of section 844.6 provides that a public entity is not liable for an injury to a person proximately caused *by* a prisoner.[120] Thus, for any injury to a prisoner caused by a fellow prisoner the incarcerating public entity is not liable. The repeal of section 844.6 could drastically affect an entity's liability for such injuries. The United States Supreme Court, in *U.S. v. Muniz*[121], held that the federal government is liable for injuries sustained in an assault by fellow prisoners where the plaintiff-prisoner alleges and proves the assault was proximately caused by a guard's negligence.[122] Would California's public entities be liable in a similar situation in the absence of section 844.6?

Section 820.8 of the Government Code provides that an employee is not liable for any injury caused by other persons. Since the entity is generally immune where the employee is immune,[123] the entity would not be liable even if the employee's negligence was the cause of the assault. However, it is possible that a court could impose liability on an

117. *In re* Riddle, 57 Cal. 2d 848, 852 (1962). *See also In re* Ferguson, 55 Cal. 2d 663 (1961).
118. *In re* Riddle, 57 Cal. 2d 848, 852 (1962).
119. *Id.*
120. This language could include injuries to members of the public "caused by a prisoner". When this provision is read with section 845.8 which says that neither entities nor employees are liable for injury caused by "escaped or paroled" prisoners, immunity for injuries to the public by *any* prisoner appears to be the intent of the legislature. *See* Ne Casek v. City of Los Angeles, 233 Cal. App. 2d 131 (1965), for a case where a citizen was injured by escaping prisoners.
121. 374 U.S. 150 (1963).
122. *Id.*
123. CAL. GOV'T CODE § 815.2(b) provides for this immunity of the entity when an employee is immune "except as provided elsewhere by statute." There is no other statute imposing liability on an entity for acts of prisoners which injure other prisoners.

employee (guard) if it found there was a duty to prevent assaults in a jail notwithstanding section 820.8.[124] The employing entity could then be liable under section 815.2 (a) of the Government Code for its *employee's* negligence.[125] If there is a possibility of public entity liability for prisoners' assaults upon their fellow prisoners, the repeal of section 844.6 must be given careful consideration.

The burden of financial responsibility for injuries sustained in prison altercations could be substantial. Since there are many violent men in prison, the prison system might break down if officials had to segregate all prisoners with propensities for violent assaults. Most prisons would not have the facilities for such segregation. Thus, the arguments for entity immunity may not be totally invalid when applied to the problem of injuries caused by other prisoners.

Since the California Penal Code protects the person of a prisoner while he is in custody, it can be argued that there should be a duty to protect him from criminal assaults by other prisoners.[126] The example of the federal system can again be used to challenge the validity of arguments for entity immunity for injuries caused by other prisoners. Although a federal prisoner can recover from the government for assaults by his fellow prisoners, he must still prove that the assault was proximately caused by a guard's negligence, or the government's negligence in not providing enough guards.[127] In California, a public entity would not be liable for injuries resulting solely from a failure to provide a "sufficient" number of guards; therefore, recovery would depend upon proof of a public employee's negligence or misconduct.[128]

The right of a prisoner to be free from assaults by fellow prisoners should be balanced against a public entity's financial burden incurred in providing and maintaining jails. The standard to be used in determining whether a public employee has breached his duty to protect prisoners in his custody must reflect this balance. The reasonable man test should provide a satisfactory standard. A prison guard should be liable only if he failed to act as a reasonable prison guard would have acted in similar circumstances. The problem then becomes one of providing a

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124. CAL. GOV'T CODE § 820.8 provides that a public employee is not liable for acts of other persons "except as otherwise provided by statute." However, the section specifically states that he is liable for his own negligent or wrongful act or omission. The legislative committee comment seems to indicate that the purpose of this section was to relieve public officers of liability for the acts of their subordinates. Therefore, the section should not affect a guard's duty to protect prisoners from other prisoners' assaults.

125. CAL. GOV'T CODE § 815.2(a).

126. CAL. PEN. CODE § 2650.

127. United States v. Muniz, 374 U.S. 150 (1963).

128. *See* text at note 108.

statute that, in the absence of section 844.6, will clarify a guard's duty and aid him in acting reasonably.

It seems evident that a prisoner cannot be protected from all criminal assaults by his fellow prisoners because the government cannot afford to hire a body guard for each prisoner. Therefore, the duty to protect a prisoner from other prisoners should arise only where prison officials have actual knowledge that an assault is probable and imminent. In such a case, a prison employee should take reasonable efforts to segregate the potential participants of the altercation. What constitutes a reasonable effort to segregate must be determined by the existing facilities and personnel. A public entity arguably should not be liable solely because the facilities are insufficient to segregate all potential troublemakers.

C. Injuries Negligently Caused by Fellow Prisoners

The repeal of section 844.6 would not impose liability on a public entity for injury to a prisoner negligently caused by a fellow prisoner unless a public employee or a dangerous condition of public property contributed to the injury.[129] Although the California Penal Code requires prisoners to work in the state prisons and provides that they will be compensated, the prisoner is not considered an employee of the State or of the Department of Corrections.[130] A prisoner is not covered by the provisions of the Workmen's Compensation Insurance and Safety Act while he is working in the prison.[131]

A provision in the California Labor Code specifically exempts prisoners engaged in fire suppression work from the provisions of the Penal Code.[132] Such prisoners are deemed to be public employees and are protected by workmen's compensation.[133] A prisoner injured by the negligent act of a fellow prisoner, while both are working in fire suppression, would be compensated under workmen's compensation provisions.[134] However, a public employee-prisoner (one working in fire suppression) may injure a prisoner not working in fire suppression and the employing entity could be liable for the injury in the absence of section 844.6 if its "employee" (the working prisoner) was negligent. A situation where such an injury could result is hard to imagine. In most

129. CAL. GOV'T CODE § 815.
130. CAL. PEN. CODE § 2700.
131. *Id.*
132. CAL. LABOR CODE § 3365.
133. *See* CAL. LABOR CODE §§ 3365, 4125.1, 3300, 3351.
134. 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Workmen's Compensation,* § 1 (7th ed. 1960).

instances both prisoners would be working at suppressing the fire and the injury would be compensable under workmen's compensation.

Does Section 844.6 Violate the Fourteenth Amendment?

Section 844.6 was challenged as violative of the due process and equal protection clauses of the fourteenth amendment in *Reed v. City and County of San Francisco.*[135] The plaintiff argued that

> no valid reason exists for classifying prisoners in a different category from other citizens who, in certain circumstances, are given a cause of action against public entities for tortious injuries.[136]

Section 844.6 creates a class of persons, prisoners, who are denied the right to recover from a public employer solely because of their status as prisoners. The court of appeal in *Reed* held that the legislature's power to control governmental tort liability is "limited only by the rule that it must not be exercised in an arbitrary manner."[137] If any state of facts can be reasonably conceived to sustain the statute the court should presume the legislature did not act arbitrarily and the statute does not violate the due process clause.[138] The court in *Reed* concluded that the increased cost of law enforcement and the difficulties of orderly prison administration were sufficient reasons for finding that the legislature did not act arbitrarily in enacting section 844.6.

The court appeared to decide the issue of equal protection with the due process test of whether a state of facts can be reasonably conceived to sustain the legislative determinaton.[139] However, it can be argued that the test for resolving the issue of equal protection is not whether a state of facts can be reasonably conceived to sustain the classification, but whether the discrimination between classes bears a reasonable relationship to the differences between the classes.[140] If the classification affects economic rights, it will not be an arbitrary and invidious discrimination in violation of the equal protection clause if there is a reasonable basis for the classification.[141] But when the discrimination from classification infringes on fundamental rights, there must be a compelling state interest to justify the classification.[142] Therefore, the important issue is whether section 844.6 infringes on a prisoner's fundamental rights or merely an economic right.

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135. 237 Cal. App. 2d 23 (1965).
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 24, *citing* Borden Farm Products v. Baldwin, 293 U.S. 194 (1934).
140. Morey v. Doud, 354 U.S. 457, 465-66 (1957); Railway Express Agency v. New York, 336 U.S. 106 (1949).
141. *Id.*
142. Skinner v. Oklahoma, 315 U.S. 535 (1942); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

The United States Supreme Court has upheld the rule of sovereign immunity.[143] Therefore, it would appear that there is no fundamental right to recover damages from a public entity for injuries caused by the entity's employee. But if a state is going to provide for government liability in tort, the equal protection clause should protect persons from discrimination based on arbitrary classification.

The argument can be made that section 844.6 infringes on a prisoner's fundamental rights because a permanent injury is, at least in part, a denial of life, liberty, and property without due process of law.[144] But even if an injury does result in loss of "life, liberty, and property," section 844.6 does not deny compensation for this loss. The section only limits the remedy for such loss to the employee causing the injury.[145]

Even if the discrimination against prisoners, inherent in section 844.6, does not infringe on fundamental rights, there still must be a reasonable basis for the discrimination.[146] The court in *Reed* did not discuss the arguments in favor of different treatment for prisoners in tort actions; the court assumed that problems of prison discipline and increased costs of law enforcement were sufficient reasons for the discrimination against prisoners. The weakness of the prison discipline argument has been pointed out above.[147] The United States Supreme Court has recently held that a state cannot preserve the fiscal "integrity of its programs . . . by invidious distinctions between classes of its citizens."[148] There appears to be no justifiable reason for the discrimination against prisoners in tort actions.

Section 844.6 can be challenged on the grounds that it creates a completely arbitrary classification *among prisoners themselves.* Section 844.6 creates a class of prisoners, those injured by motor vehicle accidents and medical malpractice, who are given preferred treatment in tort actions. This class can satisfy personal injury judgments against the public entity-employer while prisoners injured in other accidents cannot.[149] This discrimination certainly seems arbitrary and has no reasonable relation to the differences in the injuries.

Conclusion: Proposal for a New Statute

The questionable constitutional validity of section 844.6 and the

143. Kawananakoa v. Polyblank, 205 U.S. 349 (1907).
144. 130 F. Supp. at 115.
145. CAL. GOV'T CODE § 844.6.
146. Morey v. Doud, *supra* note 140.
147. *See* text at note 84.
148. Shapiro v. Thompson, 394 U.S. 618, 633 (1969).
149. CAL. GOV'T CODE § 844.6(a), (b), (d).

weakness of the justifications for the section suggests that the legislature should replace or repeal it. In addition, the arguments for public entity liablity in this area appear to outweigh the arguments for immunity. If one concludes that prisoners have the right to be compensated for injuries by public employess as section 844.6 now provides, then there is no justifiable reason for the immunity of the financially responsible public employer. Persons other than prisoners have the right to enforce personal injury judgments against the public employer.

The right of a prisoner to recover damages from a public entity for injury caused by another prisoner is more debatable. Imposing liability on the entity for these injuries would go beyond the principle of *respondeat superior*. However, where the other prisoner's act which causes the injury is the result of a breach of some duty by a public employee, entity liability is not unreasonable or unjustified.

The following is a proposal to replace section 844.6:

> (a) A public entity is liable for any injury to a prisoner proximately caused by the negligent or wrongful act or omission of said entity's employee acting within the scope of his employment. Nothing in this Section shall exonerate a public employee from his own liability for such act as provided in Article 3 (commencing with section 820).
>
> (b) Nothing in this section shall be construed to deprive an employee of a prison, jail or other correctional facility of the right to use reasonable force to maintain discipline and enforce regulations of the facility where the employee is charged with such duty. Neither a public entity nor a public employee shall be liable for any injury resulting from the use of such force where necessary.
>
> (c) Neither a public employee nor a public entity shall be liable for any injury to a prisoner caused by another prisoner unless:
>
> (1) a public employee had actual knowledge of the probable, imminent occurence of the act resulting in injury, and
>
> (2) the employee fails to take reasonable measures under the circumstances to prevent the injury.

The first subdivision of this section will give a prisoner the same opportunity other persons have to enforce a judgment against the public entity-employer. Subdivision (b) makes it clear that there is no liability for injury caused by the use of reasonable force when properly employed.

Subdivision (c) makes it clear that a prison employee has a duty to take reasonable measures to prevent intentionally or negligently caused injury by prisoners. In many prisons assaults among prisoners are al-

ways "probable". "Imminent" is inserted to avoid an interpretation which would result in liability when one prisoner attacks another without any prior warning of the attack. This subdivision provides a cause of action when a prisoner can prove that a guard had prior knowledge of the attack which injured him. The proposal will not lessen the plaintiff-prisoner's burden of proving actual knowledge of the attack by a guard; this burden may frequently be impossible to sustain. But the purpose of the proposal is to allow the injured prisoner an opportunity to assume the burden and prove that a guard's breach of duty contributed to the injury. The proposal is not intended to solve the prisoner's problems in proving prior knowledge and unreasonable conduct by a guard.

Section 844.6 of the Government Code should be replaced by a provision which will allow a prisoner to recover damages from a public entity when the prisoner alleges and proves the entity's employee caused or partially caused the injury. Allowing entity immunity solely on the grounds that the injured party is a prisoner creates an unjust and unnecessary classification in our society.

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